Investigation Procedure For Harassment Complaints



When an employer receives a complaint a prompt and thorough investigation is the best response. Since every complaint has the potential to become a lawsuit, investigations should be welldocumented and prepared in a way that could be presented in court if needed. Below are steps to follow once a complaint has been received (either written or verbal).

STEP 1: ENSURE CONFIDENTIALITY

While it may not be possible to keep all information gathered in the initial complaint, such as interviews and records, completely confidential it should be explained to the complainant and everyone involved in the investigation that all information gathered will remain confidential to the extent possible. Absolute confidentiality to any party involved in the investigation should never be promised.

STEP 2: PROVIDE INTERIM PROTECTION

Separating the alleged victim from the accused may be required to guard against continued harassment or retaliation. Schedule changes, transfers or leaves of absence may be necessary but generally complainants should not be involuntarily transferred as such an action may appear to be retaliatory and result in a retaliation claim. Prior to making any decisions an employer may wish to seek legal advice.

STEP 3: SELECT THE INVESTIGATOR

The appropriate investigator should possess all of the following:

An ability to investigate objectively without bias.

- No stake in the outcome. The investigator should not have a personal relationship with the involved parties. The outcome should not directly affect the investigator’s position within the organization.
- Skills that include prior investigative knowledge and working knowledge of employment laws.
- Strong interpersonal skills to build a rapport with the parties involved

and to be perceived as neutral and fair.
- Attention to detail.
- The right temperament to conduct interviews.

In addition, the investigator should be in a position to maintain confidentiality, be respected within the organization (because his or her conclusions will be used to make a determination),have the ability to act as a credible witness and, if internal, have the likelihood of continued employment with the company.

Employers generally use the resources of experienced HR professionals, internal security, legal counsel (inside or outside) or a third-party investigator. There are distinct advantages and disadvantages to each type of investigator that can be selected:

1. **HR staff.** HR is the most common choice. Employers often assign the responsibility for investigations to HR professionals because of their specialized job training as well as prior experience in conducting workplace investigations. HR representatives hold a particular advantage because of their superior interpersonal skills; employees typically feel comfortable with them and are willing to confide in them. HR also has the ability to remain impartial, is familiar with the employees, and has knowledge of the organization and of employment laws. The disadvantage is that employees may associate HR representatives too closely with the organizational management and therefore not perceive them as neutral in the investigation. Additionally, management may object if the HR professional has a close personal connection with the involved employee(s).
2. **Internal security.** These professionals typically have training in investigation methods that allow them to obtain information from sources that a lesser-trained investigator may overlook. Conversely, because of their training and assertive style, internal security representatives may be viewed as intimidating by employees and therefore may become less productive. Employers should consider the specific security personnel’s interpersonal skills, personal relationships with those involved and personality or approach to conflict. Security personnel may also have less of an employment law background, thus limiting their ability to conclude whether sources are reliable and potentially admissible in court.
3. **Outside or non-lawyer, third-party investigators.** They are more commonly used when an employer does not have an internal person who possesses the necessary qualifications or the time to conduct the investigation, or if the person accused is among the senior leaders in the organization. They can provide objectivity that an internal investigator may lack. An employer may use former senior-level employees to conduct investigations because of their knowledge of the organization and employees, or a human resource consultant or other independent investigator because of his or her knowledge specific to investigatory methods and techniques.
4. **Legal counsel investigators, both in-house and outside.** These investigators have ethical and privileged considerations. They must disclose to the parties involved in the investigation the purpose of the investigation and the attorney-employer relationship. Legal counsel investigators should clearly disclose that the organization, not the accused employee, is the client. Outside counsel brings objectivity to the investigation but lacks knowledge of the employer’s culture and the employees. In-house counsel does have knowledge of company culture and its employees. However, both in-

house and outside counsel can be perceived as intimidating, which could restrict the employees' willingness to be open and provide information.

5. **Team approach.** An employer might also consider a team approach. Teams provide a multitude of experience, resources and ideas. A team may make up for areas a single investigator may lack, such as experience, expertise in employment law, the ability to obtain witness information or knowledge of internal issues and culture. Generally, a good team, which is often an outside attorney working with HR, covers all internal and external gaps that would be associated with a single investigator. The team approach provides the ability to collaborate in the event that the accuser, the accused or a witness alters his or her earlier statements.

STEP 4: CREATE A PLAN FOR THE INVESTIGATION

An investigation must be planned to be effective and properly executed. A complete plan should include an outline of the issue, the development of a witness list, sources for information and evidence, interview questions targeted to elicit crucial information and details, and a process for retention of documentation (e.g., interview notes and e-mails that could be treated as evidence).

The use of all available resources will assist the investigator in developing a proper plan. The Equal Employment Opportunity Commission (EEOC) provides guidelines and definitions to employers on specific topics such as sexual harassment and discrimination. Additionally, numerous online and print sources are available to assist and even provide a step-by-step guide.

INTERVIEW PLAN EXAMPLE

The number of days and amount of time it takes to complete a thorough investigation will vary depending on the circumstances. The following is an example of how an HR professional may organize and complete an investigation:

Day one (HR should have already reserved a secluded conference room for the entire day.) The investigator should allow time between interviews to type up notes and adjust to new information, evidence or witnesses. Keeping the investigation flowing as efficiently as possible, the interviewer may conduct interviews earlier or later as needed to allow enough time to gather all the required information. Additional time may be necessary depending on the number of witnesses and amount of information provided.

- 8 a.m. Interview accuser (to clarify details and gather evidence and witnesses).
- 9 a.m. Read over interview notes, and fill in details while still fresh.
- Determine who should be interviewed next: the accused or some of the witnesses.
- 10 a.m. Next interview will potentially be the accused to hear his or her side of the story and to gather evidence and witnesses.
- 11 a.m. Complete notes and prepare for next interview.
- Lunch
- 1 p.m. Interview potential first witness, and take time to complete interview notes.
- 2 p.m. Interview second witness, and take time to complete interview notes.
- 3 p.m. Interview third witness, and take time to complete interview notes.

- 4 p.m. Review notes for entire day, and make plan for second day.

Day two (HR should have already reserved a secluded conference room for the entire day.)

- 8 a.m. to 3 p.m. Finish any additional witness interviews.Handle any follow-up interviews with accused, accuser or witnesses as needed to clarify information previously discussed or to ask new questions about evidence or information disclosed after the initial interview.
- 3 p.m. to 5 p.m. Review interview notes, evidence and credibility assessment. Establish proposed recommendation for action to present to upper management.

Day three

Morning: Discuss proposed resolution with upper management, and decide on final resolution.

Afternoon: Create any relevant disciplinary actions, warnings or memos.

Day four

- Morning: Hold closure meeting with accused and accuser separately.
- Afternoon: Write investigation report/summary.

STEP 5: DEVELOP INTERVIEW QUESTIONS

Questions should be developed ahead of time in the planning stage, although additional questions will be added throughout the investigation as more evidence and information are shared. Good questions are relevant and designed to draw out facts without leading the interviewee; they should be open-ended to elicit as much information as possible. Section V of the EEOC's Enforcement Guidance – Questions to ask Parties and Witnesses provides sample questions for the complainant, alleged harasser and third parties/witnesses. The EEOC also cautions that "any actual investigation must be tailored to the particular facts."

STEP 6: CONDUCT INTERVIEWS

Once the appropriate investigator has been selected, an investigation plan has been developed and interview questions have been created, interviews can be conducted. The investigator should inform all parties involved of the need for an investigation and explain the investigation process. Caution should be used when stressing confidentiality of the investigation process as this can be seen as interference with employee rights to engage in concerted activity under the National Labor Relations Act (NLRA).

The investigator should focus on being impartial and objective to gather and consider relevant facts. Prevention from pushing the investigation in any particular direction is imperative. The investigator should never offer any opinion or say anything to interviewees that will discredit his or her impartiality. Objectivity must be maintained with every interview.

Taking notes, looking for inconsistencies, and seeking opportunities for more evidence and names of other potential witnesses should be a consideration as

well. Asking the employee to write down what happened may help find inconsistencies. There may be a disparity between what the employee is willing to write and what he or she told you in the interview.

Investigators must determine employees' credibility. Interviews provide differing accounts and even conflicting versions of the events. Be aware that the issue is very personal to employees involved. Because of the personal and emotional nature of the issue, their individual perceptions of what happened may be clouded by personal interests, or if their jobs are on the line, they may even lie. Investigators must consider the credibility of the individuals being questioned during an investigation and use techniques (e.g., inherent plausibility, ability, demeanor, motive, motive to falsify, corroboration, past behavior and past accusations) in assessing credibility.

Investigators should be cautious when conducting interviews to avoid any harsh interrogation tactics that could result in charges such as coerced false confessions and false imprisonment.

STEP 7: MAKE A DECISION

Through the investigation, the investigator must be careful not to jump to any conclusions before all the facts are available. Once the interviews are conducted, other necessary procedures, such as evidence collection, should be completed. Once any credibility issues have been resolved, the investigator will evaluate all the information for a formal recommendation. The investigator or member of management, as well as legal counsel, should make the final determination of any employment actions that are warranted based on the investigative report. The employer must consider all the parties involved as well as organizational processes, not just whether the accused has engaged in the alleged wrongdoing, in the final determination.

STEP 8: CLOSURE OF INVESTIGATION

Once a decision is made, the employer should notify both the complaining employee and the accused of the outcome. It is important to let the complainant know that the organization took the complaint seriously and took appropriate action. The organization must ensure the complainant agrees that he or she has been properly heard and understood, even if he or she is not in agreement with the results. The investigator should set a time frame to follow up with the complainant to ensure there are no other issues and that he or she is settling back into the work environment. The employer should encourage communication and follow-up until the complainant is comfortable again. Finally, the investigator should remind all parties to preserve confidentiality as appropriate.

When necessary, employers must take corrective action that is appropriate to the situation, such as discipline or even termination. The employer should:

- Look at any damages incurred by the victim and discuss with legal counsel how to remedy those damages.
- Determine if education, such as sexual harassment training, would be beneficial to the individual or all employees.
- Consider if the need exists to review, modify or redistribute workplace policies.
- Determine whether a review of the investigation and complaint resolution

processes is necessary.

STEP 9: DEVELOP WRITTEN SUMMARY INVESTIGATION RESULTS

If operating on the premise that every investigation of a serious nature could potentially be heard and reviewed by a court, the employer should consider preparing a final investigative report. The organization should keep a clear paper trail of the evidence, such as examining documentation of previous employee behavior and incidents. The investigator should have a clear record of everything done and any findings as well as other steps taken during the investigation. Employers should also document interviews with the accused, the accuser and witnesses. Investigators should ensure their notes from interviews are as factual as possible, contain as much relevant information as possible, are dated and indicate the duration and time of the interviews.

The final report should summarize the following:

- The incident or issues investigated, including dates.
- Parties involved.
- Key factual and credibility findings, including sources referenced.
- Employer policies or guidelines and their applicability to the investigation.
- Specific conclusions.
- Party (or parties) responsible for making the final determination.
- Issues that could not be resolved and reasons for lack of resolution.
- Employer actions taken.

The goal of the document is to ensure that if a court, jury or government agency were to review it, the reviewers would conclude that the employer took the situation seriously, responded immediately and appropriately, and had a documented good-faith basis for any actions taken during or as a result of the investigation.

When an employee makes an informal or formal complaint, the employer should take immediate steps to stop the alleged conflict, protect involved parties and begin investigations. Under many laws

(e.g., Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Occupational Safety and Health Act (OSHA), the Sarbanes-Oxley Act, state and local nondiscrimination laws), employers are legally obligated to investigate complaints (harassment, discrimination, retaliation, safety and ethical) in a timely manner. In addition, any appropriate corrective action is required to be taken by the employer to ensure illegal actions and behaviors cease immediately.